



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Adamson Containers, Ltd.  
**File:** B-219791.2  
**Date:** August 4, 1986

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### **DIGEST**

1. Protest that agency erroneously evaluated and accepted awardee's bid is dismissed as untimely where filed with the General Accounting Office more than 10 working days after the protester received notice of adverse action on its agency-level protest.
2. Allegation that awardee lacks integrity constitutes a protest against an affirmative determination of responsibility, which the General Accounting Office will not review in the absence of a showing of possible fraud or bad faith on the part of the contracting officer or a failure to apply definitive responsibility criteria.

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### **DECISION**

Adamson Containers, Ltd., protests the award of a contract to J.D. Bertolini Industries, Ltd., under invitation for bids (IFB) No. N62472-85-B-3115, issued May 31, 1985, by the Naval Facilities Engineering Command, Davisville, Rhode Island. The solicitation called for shipping and storage containers, and contained Buy American/Trade Agreements/Balance of Payments Program certifications under which bidders were to certify that, except as otherwise indicated, each end product offered was a domestic-source end product. We dismiss the protest as untimely.

Adamson first protested to the Navy by telex dated December 18, 1985, arguing that an award to any bidder other than Adamson would violate the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2502 (1982), and implementing regulations. The Trade Agreements Act prohibits the purchase of foreign-end products other than designated-country end products. Adamson asserted that all other bidders intended to supply end products from Korea, a country not a signatory to the international agreements implemented by the Trade Agreements Act and, thus, were ineligible for award. The protester further contended that, apparently, the Navy improperly had determined whether offered products were domestic-end products by aggregating all line items in calculating domestic content, rather than calculating domestic content on a line item basis. Adamson also challenged the transportation differential applied to its bid.

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On January 10, 1986, Adamson alleged to the Navy that one bidder, in response to Adamson's protest, improperly had amended its bid to offer to supply products from Hong Kong or Japan, after originally certifying that it would supply only domestic-end products. On April 9, Adamson protested the eligibility of Bertolini, the proposed awardee, on the ground that Bertolini did not provide the Navy with an adequate response to the Navy's request for the percent of foreign content of labor and materials for each line item of the IFB. Adamson also questioned Bertolini's responsibility.

On April 25, the Navy responded to Adamson's protest, stating its view that as long as a contractor can show, during the preaward survey, that more than 50 percent of the cost of the product is from the United States or a qualifying country, the contractor has complied with the Buy American/Trade Agreements/Balance of Payments Program certificate requirement to supply a domestic-end product. The response also noted that the Navy does not make a final determination as to a bidder's responsibility until the conclusion of the preaward survey.

On May 13, Adamson again protested award to Bertolini, alleging that the proposed awardee was planning to supply end products from a qualifying country rather than domestic-end products as it had certified in the Buy American/Trade Agreements/Balance of Payments Program certificates and therefore was impermissibly modifying its bid. Adamson also contended that such qualifying end products must actually be manufactured in the United States since the bidder did not list a foreign source on its certification. The Navy denied Adamson's protest in a May 20 letter, stating that Adamson had not shown that Bertolini would not comply with the certification, and also had not shown either Bertolini's bid to be nonresponsive or the bidder to be nonresponsible. By letter of May 27 to the Navy, Adamson once more protested the acceptability of Bertolini's bid and the firm's responsibility.

The Navy awarded the contract to Bertolini on May 22, and notified Adamson of the award in a May 27 letter. Adamson protested to our Office on June 13, arguing that the award was improper for, basically, four reasons. The first two involve Bertolini's alleged failure to comply with the Buy American/Trade Agreements/Balance of Payments Program certifications, and the subsequent post-bid-opening modification of those certifications; these issues were raised by Adamson with the Navy on May 13, and were answered in the Navy's May 20 letter. The third reason is that Bertolini allegedly is nonresponsible, based on a March 5, 1986, decision of the Small Business Administration (SBA) in connection with another procurement in which Bertolini participated. Finally, Adamson reasserted from its December 26 protest the argument that the Navy improperly was determining whether end products were domestic by aggregating all line items.

Our Bid Protest Regulations provide that if an initial protest has been timely filed with the contracting agency, we will consider a subsequent protest to our Office only if filed within 10 days after the protester has actual or constructive knowledge of initial adverse agency action, 4 C.F.R. § 21.2(a)(3) (1986), that is, any action or inaction by the contracting agency which is prejudicial to the protester's position. 4 C.F.R. § 21.0(e). Here, the Navy denied Adamson's protest as to the certification issues in its April 25 and May 20 letters. Although Adamson does not state when it received the May 20 letter, we assume receipt by regular mail within 1 calendar week after mailing. T.S. Head & Associates, Inc., B-220316, Sept. 30, 1985, 85-2 C.P.D. ¶ 368. We thus assume Adamson received the May 20 letter no later than May 27. Since Adamson did not protest to our Office until June 13, more than 10 working days later, its protest on these issues is untimely, and we will not consider it. See Langfur Construction Corp., Feb. 27, 1986, 86-1 C.P.D. ¶ 207.1/

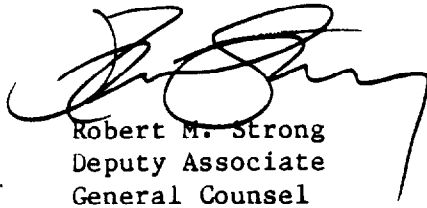
Adamson's protest as to the aggregate line item evaluation also is untimely. While the Navy did not specifically address this issue in either the April 25 or May 20 letters, it was clear from these letters that, notwithstanding Adamson's December protest, the Navy considered Bertolini's offered products acceptable and not subject to application of price differentials. Thus, to the extent Adamson still believed the Navy was calculating domestic content improperly, it was on notice of the Navy's opposite position upon receipt of the May 20 letter, and had to protest to our Office within 10 days afterward. In this regard, it is not relevant that Adamson filed another protest with the Navy in its May 27 letter. See Control Data Corp., B-214259, Sept. 26, 1984, 84-2 C.P.D. ¶ 359. The fact that a protester continues to pursue a matter with the agency after initial adverse action does not extend the time limit for filing with our Office. See Trane Air Conditioning, B-214259, Sept. 26, 1984, 84-2 C.P.D. ¶ 359.

Adamson argues that Bertolini should have been found nonresponsible based on a lack of integrity and ethics in light of an SBA decision that Bertolini incorrectly had certified itself as a small business on a prior procurement. This allegation constitutes a challenge to the Navy's affirmative determination of Bertolini's responsibility. Our Office will not review such a determination in the absence of a showing of possible fraud or bad faith on the part of contracting officials or a failure to apply definitive responsibility criteria. 4 C.F.R. § 21.3(f)(5). Neither exception is alleged here.

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<sup>1/</sup> Counsel for Adamson asserts that it received the Navy's May 27 notice of award on May 30 and that its protest would be timely measuring from this date. However, timeliness of a protest is measured from initial adverse agency action, which here was the receipt of the May 20 denial of Adamson's agency protest, rather than the May 27 notification of award.

The protest is dismissed.



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